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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

JERRY LEE NEDD

VERSUS

STATE OF LOUISIANA THROUGH
DEPARTMENT OF INSTITUTIONS

PETITION OF JERRY LEE NEDD FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF LOUISIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

Jerry Lee Nedd, Petitioner

vs

State of Louisiana Through
Department of Institutions,
Respondents

Jerry Lee Nedd hereby petitions this Honorable Court for a Writ Of Certiorari to review the Judgment rendered by the Louisiana Supreme Court on August 18, 1973 wherein said court by a five to two decision affirmed the First Circuit Court of Appeal and the Nineteenth Judicial District Court for the Parish Of East Baton Rouge.

Grounds Upon Which Jurisdiction Is Based

Jurisdiction is invoked under 28 USCA Section 1257 (2 & 3) and 28 USCA Supreme Court Rules Part V, Rule 19.

The Judgment of the Supreme Court of Louisiana, here sought to be reviewed, was dated and entered on June 11, 1973. The petition for re-hearing was denied on August 18, 1973.

The Constitutional issues involved herein were presented to the Court of Appeal for the First Circuit and the Louisiana Supreme Court in briefs filed in that Court. Neither the Court of Appeal nor the majority in the Louisiana Supreme Court commented upon, evaluated and/or judicially determined the applicability of the Constitutional questions that are now being presented to this Court for determination. The two dissenting Justices in the Louisiana Supreme Court recognized the fact that the plaintiff's constitutional rights had been violated.

The questions presented for review.

a) Special issues of national scope and

importance which apply to every individual confined to any federal, state, county and municipal prison, jail, house of detention and/or penitentiary throughout the United States.

b) An issue in which various Louisiana courts decided a federal question of substance not heretofore determined by this court and rendered said decision in a manner that probably is not in accord with the applicable decisions rendered by this court as well as other courts throughout the federal judiciary system.

c) Louisiana Trial, Appellate and Supreme Court decisions which failed to recognize and/or comprehend the significant importance of applying U. S. Constitutional provisions and principles to the various issues that had been presented to the courts for determination.

Statement of the Case.

Petitioner filed suit against the State of Louisiana through the Department of Institutions, for serious personal injuries sustained as the result of an assault

by a fellow inmate, McKinley Peterson. On January 27, 1968, McKinley Peterson severed three of his fingers with a cane knife. The Trial Judge rendered judgment in favor of the defendant. On Appeal, the Court of Appeals for the First Circuit affirmed. Writs were granted by the Louisiana Supreme Court and the majority decision affirmed the Court of Appeals.

Jerry Nedd was previously received at the Louisiana State Penitentiary (Angola) on November 9, 1954 with the sentence of ten years for the crime of possession of narcotics. McKinley Peterson was admitted to Angola in May, 1956 for armed robbery and habitual felony conviction. In August, 1958, Jerry Nedd and McKinley Peterson were trustees at Camp I and as such lived together in the same dormitory. Nedd and Peterson had some difficulties and as a result of this while Nedd was sound asleep in his bed during the night time on August 10, 1958 McKinley Peterson approached his bed and struck

him with tremendous force with a lead pipe which landed on Nedd's skull.

As a result of the incident, Nedd was taken to the Charity Hospital of Louisiana at New Orleans. Nedd suffered a depressed comminuted fracture of the frontal bone and other skull fractures and, as a result of these injuries, an incision was made in the frontal region of the area of the depression and an elevation of the depressed skull fracture was performed. After his hospital stay in New Orleans, Nedd was discharged to the Angola Hospital. He was, thereafter, placed on permanent light duty for the remainder of his incarceration.

Peterson was charged in the Twentieth Judicial District Court for the Parish of West Feliciana with the crime of committing a battery with a dangerous weapon upon Jerry Nedd on August 10, 1958. Accompanied by counsel, Peterson plead guilty on December 4, 1958 and

he was sentenced to serve a term of five years at hard labor at the Louisiana State Penitentiary, the said sentence to run consecutively with the sentence he was presently serving.

Following the 1958 attack, Nedd remained in Camp I and Peterson was transferred to Camp A. The prison authorities continued to keep Nedd and Peterson separated. Nedd was released via discharge on September 7, 1962 and Peterson was paroled on November 13, 1963.

Peterson was again returned to Angola on April 9, 1965 as a parole violator and a new term of 20 years to run concurrently with the balance. He plead guilty to three armed robberies and he received 20 years to run concurrently on each armed robbery.

Nedd was next received at Angola on January 12, 1967 with a sentence of 15 years for the crime of possession of a narcotic drug, to-wit, marijuana.

During the time that Nedd and Peterson were out of

Angola, they did not have contact with each other.

Upon being received at Angola an inmate goes through an admission unit which lasts approximately 30 days. During this orientation period information is gathered on the prisoner and studies and testings are made to determine his classification and type of security. Once the prisoner has completed AU, he then meets the Classification Board. During the AU, Nedd came in contact with inmates and found out that McKinley Peterson was "on the big yard". He testified: "I didn't want to be around him.....like I aforesaid I went out there, too, and a man got five years for hitting me on the head, and I don't know how he going to take it."

When Nedd met the Classification Board on February 23, 1967, he was told that he was going to be sent to the same area where McKinley Peterson was living. He then advised the Board that he could not live there be-

cause of Peterson and the Board assigned him to a cellblock.

Major Robert Bryan, the Chief of Security at Angola, who was seated on the Board at the time admitted that Nedd "said he couldn't make it there so I put him in the cellblock... I knew that he had probably had a little trouble on the yard, maybe with some inmate, so I didn't force him to go to the yard... but I tell you the truth, I didn't believe him when he said it. I thought maybe he might be trying -- still trying to go to Camp I as a trustee".

On February 23, 1967, Nedd was assigned to the cellblock until he was transferred to Camp A on November 1, 1967. In being confined to a cellblock, he had less privileges than he would have had had he been assigned to a Camp, such as where McKinley Peterson was assigned. There is more confinement to a cellblock but the security is greater.

Without meeting any Reclassification Board, Nedd received orders in October 1967 that he was to be transferred from the cellblock to Camp A. During the course of the transfer he met Major Bryan at the control center and told him he could not go to Camp A since Peterson was there. Bryan told Nedd: "You go where we send you, you don't go where you want to go".

Nedd, thereafter, remained in Camp A with McKinley Peterson until the time of the incident in question. Nedd avoided any contact with Peterson during this time and he had nothing to say to him. On a number of occasions, Peterson would just stare at Nedd. Nedd stated: "I didn't want to go over there from the beginning; the people made me went over there; I have to do what they say; he could have got to me any time he got ready".

At the time of the attack, Nedd was seated on his bed. He noticed Peterson approaching him with a cane knife. He reached under his bed to grab a bed board

to protect himself but he was too late because Peterson came down with the knife, severing three of his fingers. The State defended on the grounds that the petitioner provoked the assault and participated in a knife fight. The Trial Judge and the Court of Appeals held that the plaintiff did not provoke the assault.

The majority opinion of the Louisiana Supreme Court held:

> "The evidence in this record does not establish a reasonable basis for placing prison officials on notice that Nedd was in danger from Peterson. The record before us established that fights occurred at the penitentiary on a daily basis; knifings, cuttings and stabbings on a weekly basis; that frequently, some men who have fought, cut and stabbed each other later live harmoniously in the prison population. Major Bryan testified that if he had known what Nedd said he told the classification board, he would not necessarily have separated Nedd and Peterson."

Argument

1) Did the defendant violate any of plaintiff's constitutional rights guaranteed to him by the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by

failing to separate Nedd and Peterson?

The dissenting opinion in part reads as follows:

> "Essentially, we feel that the record indicates that the state knew, or should have known, of the great danger of harm to which the plaintiff Nedd was exposed by being placed in unguarded proximity to the vengeful Peterson, his assailant. (See Appendix for entire opinion).
>
> Aside from Nedd's repeated attempts to secure separation from Peterson, the danger to Nedd was, or should have been, obvious. The state should not be able to exculpate itself from liability to inmates upon a claim of ignorance of facts of which it should be aware...
>
> ...Those who have custody and control over the decisional processes and the freedom of movement of people in an institution, such as the penal institution operated by the defendant, are responsible for their own affirmative acts or omissions which directly result in injury through breach of duty...
>
> ...In a penitentiary environment an inmate is severely limited in his means of self-protection and self-control, while the chance of his encountering violence and intentional assaults and batteries is multiplied by the very conditions under which he must live. When a number of persons, many of whom are known to be predisposed to violence, are forced to live together in confined quarters under unnatural conditions,

it is not unusual for an explosive situation to develop. The plaintiff-prisoner, one of a special class of persons, and the defendant-authority here have a particular and peculiar relationship not existing between persons in an ordinary community, and therefore whether the scope of duty owed encompassed the risk of the intentional harm here encountered must be determined in the light of this peculiar relationship and these special circumstances.

While imprisonment of one convicted of crime may deprive him of certain constitutional rights as well as other rights and privileges accorded the non-criminal, only those rights necessary for carrying out the public policy of the state as set out in the statutes governing imprisonment of criminals may be curtailed or denied the prisoner. All other rights not expressly or impliedly taken away by statute as part of the criminal sanction and the correctional process are retained by the prisoner.

Freedom of movement, freedom of choice, and the facility for self-protection are essentially denied or at least curtailed under the statutory authority for carrying out the correctional process in Louisiana. Therefore those who have custody over prisoners are under a duty to exercise reasonable care in controlling the conduct of the prisoners to prevent them from intentionally harming one another. The custodians must exercise this care in light of the knowledge of the propensity of those whom they control from

inflicting intentional personal injury upon others, and knowledge of the probabilities that because of special circumstances the custodians may be required to protect certain prisoners from intentional wrongs. This does not mean the penitentiary authorities are held accountable for any and all injuries inflicted by one inmate on another. Their accountability is determined by the facts that are within their knowledge or should have been within their knowledge...

...The prison authorities would be charged with constructive notice of the probability of the particular risk to Nedd under the facts and circumstances of this case. However, the prison authorities actually knew of the grave risk that intentional harm would be inflicted by Peterson on Nedd if they were confined together...

...It is not probable under the record that any affirmative action by Nedd, through letters or other notice, would have changed the attitude of the prison authorities so that his circumstances would have been changed. As the majority votes, the prison authorities were not seriously concerned with the dangerous circumstances confronting Nedd. The very nature of the operation of the prison requires that any decision regarding placement of prisoners must rest with the prison authorities. With as much actual notice as they had of the circumstances which should have resulted in separation of these two inmates, further notice more probably than not would have availed Nedd little. The defendant cannot shift the responsibility it has for physical placement

> of the inmate Nedd simply because he finally desisted from complaining of a matter of which they had actual knowledge. As previously noted, the final authority, the Chief of Security had told Nedd he would go where he was told to go and not where he wanted to go. Persistance did not and would not have availed any change for Nedd.
>
> Within the limited facilities available, the penitentiary administration may have done its best; but this best was not enough to afford adequate custodial safety as demanded by the standards of a civilized society. The state's failure to appropriate adequate monies for the state's institutions to perform their custodial function should not, in this last part of the Twentieth Century, immunize the state from liability to an inmate who is injured through the state's lack of reasonable care in furnishing reasonable safeguards for his physical security while he is in the state's custody and unable to fend for himself.
>
> We therefore respectfully dissent."

In the past, Courts have held that prisoners had no constitutional rights at all. Ruffin v. Commonwealth, 62 VA 790 (1876). This concept has been discarded as erroneous, and the Courts now recognize that a prisoner does not lose all civil rights during and because of

incarceration. Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968). This Honorable Court has recognized that "persons" under the Constitution includes prisoners. Cruz v. Beto, 405 U.S. 319, 31 LED 2d 263, 267 (1972). In Brenneman v. Madigan, 343 F. Supp 128 (N. D. Calif. 1972) the Court stated:

> "Notwithstanding that imprisonment may deprive the convict of certain rights which would otherwise be his to enjoy, a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

In Jones v. Wittenberg, 323 F. Supp 93, 98 (N. D. Ohio W. D. 1971) the Court stated:

> "Prisoners do not lose all their constitutional rights when they enter a penal institution. Rather they retain all of their constitutional rights except those which must be impinged upon for security or rehabilitation purposes."

Two fundamental rights of petitioner have been violated in this case. By reason of his being assigned to the same section of Angola as Peterson, petitioner

was denied his Eighth Amendment rights to be free from cruel and unusual punishment and his Fourteenth Amendments rights to due process of law.

In Hancock v. Avery, 301 F. Supp 786, 791 (M. D. Tenn. 1969) the Court noted that Courts have been particularly concerned in recent years with protecting prisoners' Eighth Amendment rights to be free from cruel and unusual punishment.

In Washington v. Lee, 263 F. Supp 327, 331 (M. D. Ala. 1966) affirmed per curiam, 390 U. S. 333 (1968), this Honorable Court stated:

> "It is well established that prisoners do not lose all their constitutional rights and that the due process and equal protection clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law".

In Brenneman v. Madigan, Supra, the statement is made:

> "The Courts are unanimous in providing a

> federal forum for attacks on conditions of confinement alleged to violate the explicit constitutional mandate against cruel and unusual punishment. In our own times, the Courts have not hesitated to impart the Eighth Amendment into the prison context to vindicate those civilized standards of humanity and decency which circumscribe the power of the State to punish those who transgress its laws."

In the case at bar, petitioner asserts that he has been subjected to cruel and unusual punishment by reason of his being assigned to the same section of Angola as an inmate who had previously brutally attached and injured him. The Eighth Amendment's prescription of cruel and unusual punishment is applicable to the States through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962).

This Honorable Court has long acknowledged that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted."

In Wilkeison v. Utah, 99 U.S. 130, 135 - 136 (1878), this difficulty and lack of an exact definition of the Eighth Amentment's prescription of cruel and unusual punishment has been repeatedly noted. In re Kemmler, 136, U.S. 436, 447 (1890); Weems v. United States, 217 U.S. 349, 368-371 (1910); Trap v. Dulles, 356 U.S. 86, 87, 99 (1958). What is definite about the Eighth Amendment's ban on cruel and unusual punishment is that its scope is not static. It "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trap v. Dulles, supra. The Court in Trap also noted that the Eighth Amendment's basic concept "is nothing less than the dignity of man".

Petitioner was sentenced by the Court to imprisonment for 15 years for possession of marijuana. By causing petitioner to live in close proximity to Peterson, the prison officials imposed an additional punishment on

petitioner: Petitioner was subjected to the additional punishment of being in constant fear for his life. This is not only the imposition of punishment by arbitrary and capricious action of prison officials without due process of law, but it also amounts to cruel and unusual punishment.

One situation in which cruel and unusual punishment has been found by the Courts is, in general terms, where the punishment, "although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is when a punishment is unnecessarily cruel in view of the purpose for which it is used." Jordan v. Fitzharris, 257 F. Supp 674 (N. D. Cal. S. D. 1966); Weems v. United States, 217 U. S. 349, 370 (1910).

Thus, the Court in Landman v. Royster, 333 F. Supp 621, 645 (ED Va. 1971) said:

> "Courts have also intervened when sentences are administered in the manner that seems unintended and unauthorized by the convicting

> Court. Relief is justifiable in some cases on the fairly basic rationale that to extend or augment punishment beyond that imposed by a State Court is to penalize without due process. A valid State judgment affords no license to exceed its terms. Perkins v. Reyton, 399 F. 2d 590 (4th Circ. 1966)."

It must be asked then, whether the Court, in sentencing petitioner to the penitentiaryintended that he be subjected to serve his sentence in mortal fear for his life and to subject him to serious risk of harm. This question can hardly be answered in the affirmative.

The Court in Landman v. Royster, Supra, described another situation in which cruel and unusual punishment is found:

> "A penalty may likewise violate the clause even though it consists only of exposing an individual to a high probability of suffering grievous injury. Cruelty exists, for example, in imposing on a man the anguish of continued uncertainty as to his fate, with knowledge that severe consequences may befall him for unforeseeable reasons against which he is powerless to protect himself."

In so holding, the Court in Landman relied on the

following language from Trap v. Dulles, Supra:

> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress."

As the Court in Landman v. Peyton, Supra stated:

> "Under our constitutional system, the payment which society exacts for the transgressions of the law does not include relegating the transgressor to arbitrary and capricious action."

In Sostre v. Rockefeller, 312 F. Supp 863 (S. D. N. Y. 1970), the plaintiff was put in solitary confinement. The Court found that the convictions of solitary confinement "could only serve to destroy completely the spirit and undermine the sanity of the prisoner...". The Court held that subjecting a prisoner to this undermining of the spirit and possible loss of sanity was held to constitute cruel and unusual punishment. So, too, here, petitioner was subjected to fear and mental anguish and this is no less cruel and unusual punishment than the conditions to which the prisoner was subjected in Sostre.

In addition, Courts have increasingly recognized that inmates have a constitutional right to be afforded at least some degree of protection from attack by fellow inmates. In Penn v. Oliver, 351 F. Supp 1292 (E. D. Va. 1972) the Court said:

> "The Court has no doubt that the Eighth Amendment's prohibition against cruel and unusual punishment places a responsibility upon prison officials to protect the person of inmates within the prison system from violent assaults by other inmates."

The Court in Penn noted that a violation of the Eighth Amendment would arise where there was "an egregious failure to provide security to a particular inmate." It would be difficult to imagine a more egregious failure than that of the Angola officials in assigning petitioner to live in close proximity to an inmate they knew or should have known had already once grievously injured petitioner and who had received an additional five year sentence because of his previous attack on petitioner.

In Gates v. Collier, 349 F. Supp 881, 894 (N. D. Miss.

1972) the Court held:

> "It is the obligation of penitentiary officials to insure that inmates are not subjected to any punishment beyond that which is necessary for the ordinary administration of the prison. Sinclair v. Henderson, 435 F. 2d 125 (5th Cir. 1970). The defendants have subjected the inmate population of Parchman to cruel and unusual punishment by failing to provide adequate protection against physical assaults, abuses, indignities and cruelties of other inmates..."

And in McLaughlin v. Roystel, 346 F. Supp 297, 312 (E. D. Va 1972), the Court said:

> "Prison officials do have a duty to protect inmates from continued exposure to the likelihood of attacks from fellow inmates; the reckless endangering of prisoners may amount to cruel and unusual punishment (citations omitted), and the injuries inflicted may constitute punishment without due process. (citations omitted)."

Other cases holding that subjecting inmates to fear of attack by other inmates can amount to cruel and unusual punishment are Hamilton v. Schiro, 338 F. Supp. 1016, 1018 (E. D. La. 1970); and Holt v. Sarver, 300 F. Supp 825

(E.D. Ark. 1969).

In Roberts v. Williams, 456 F. 2d 819 (5th Cir. 1972), petitioner was injured because of the negligent handling of a gun by a trusty guard. The defendants maintained that cruel and unusual punishment could not result from mere negligence. The Court disagreed in saying:

> "Thus, in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we look next for a callous indifference to it at management level, in the sustained knowing of maintenance of bad practices and customs."

The Court also found cruelty in the maintenance of "a needlessly hazardous condition for plaintiff..."

Here, Angola officials were callous and indifferent to petitioners Eighth Amendment rights in assigning him to live in close proximity to Peterson. They were also subjecting the petitioner to "needlessly hazardous" conditions.

Petitioner has also been denied due process of the laws under the Fourteenth Amendment. Although confinement of a prisoner in one section of the prison instead of another "does not ordinarily" violate any constitutional right, "The Courts must also endeavor to distinguish mere matters of discipline from arbitrary and capricious disregard of human rights. Even convicted criminals cannot be constitutionally subjected to a regime under which their rights are dependent on the actions of prison officials wholly unaccountable in the exercise of their power." Brenneman v. Madigan, Supra.

In Brenneman v. Madigan, the Court stated:

> "Due process is a pervasive concept which embodies, even in its most rudimentary form, the notion of fundamental fairness whenever governmental action may result, as it does here, in grievous loss to the individual. What process is due varies with the circumstances and "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as

> well as the private interest that has been affected by governmental action".

As in Brenneman, supra, the governmental function involved in the case at bar is the maintenance of "the security of a population confined against its will in close quarters". The Court in Brenneman found this to be a legitimate concern, but nevertheless held that some measure of due process is required. Petitioner was certainly not afforded due process when, after informing prison officials that he did not want to be assigned where Peterson was, he was told that he would go where the prison officials sent him.

In Landman v. Royster, Supra, the Court said:

> "Substantial deprivations of rights even in matters called civil where no misconduct is alleged have not been permitted without due process. Reasons of security may justify restrictive confinement, but that is not to say that such needs may be determined arbitrarily or without appropriate procedures."

Here, petitioner was denied his right to be free from

fear for his life and his right to protection from attack by another inmate. He was also denied his right to be free from punishment without due process. His three fingers were cut off as a result of the state's denial of due process to him.

Finally, in Sostre v. McGinnis, 312 F. Supp 363, 872 (S. D. N. Y. 1970), the Court said:

> "Basic constitutional rights cannot be sacrificed, even in the case of prisoners, 'in the interest of administrative efficiency'. United States ex rel Marcial v. Fay 247 F. 2d 662, 669 (2d Cir. 1957)cert. denied, 355 U. S. 915 (1958)."

Even if the Court should find that the fear petitioner was subjected to and the loss of three fingers because of the brutal attack by Peterson, was not cruel and unusual punishment, it is submitted that the assignment of petitioner to the same section of Angola as Peterson by Angola officials, which caused petitioner to be seriously injured, was an infliction of punishment without due

process of laws.

> "Obviously, no person may be punished without due process of law... Hence even if that punishment were not cruel and unusual, it would still be proscribed ... since it (was) imposed as a matter of form and routine and without any semblance of due process or fair treatment."

Indeed, it has been recognized that where prison officials have failed to protect inmates from attack by fellow inmates, the injuries inflicted may constitute punishment without due process. Roberts v. Williams, 302 F. Supp 972 (N. D. Miss. 1969); McLaughlin v. Royster, 346 F. Supp 297 (E. D. Va 1972); C. f. Jenkins v. Averett, 424 F 2d 1228 (4th Cir. 1970).

In Holt v. Sarver, Supra, the State's duty was described as follows:

> "The Court is of the view that if the State of Arkansas chooses to confine penitentiary inmates in barracks with other inmates, they ought at least to be able to fall asleep at night without fear of having their throats cut before morning,

and that the State has failed to discharge a constitutional duty in failing to take steps to enable them to do so."

The statement has further been made:

"If a man is going to be convicted of a crime and stripped of his liberty by society's law, then we must enable him to live in an environment where he can depend on the law to protect him -- not in a lawless society where he survives only by breaking the law, where the law is fear." North Carolina Law Review, No. 4, June, 1970.

5.

Conclusion

Wherefore, petitioner respectfully submits that a Writ of Certiorari should be granted.

THE LAW OFFICES OF STEVEN R. PLOTKIN

STEVEN R. PLOTKIN

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing petition upon Mr. Stanford O. Bardwell, Jr., Attorney for defendant, by depositing said copy in the United States mail addressed to him c/o State of Louisiana, Department of Justice, Baton Rouge, Louisiana 70804, postage prepaid.

New Orleans, Louisiana, November 7, 1973.

STEVEN R. PLOTKIN

SUPREME COURT OF LOUISIANA

No. 52073

JERRY LEE NEDD

MONDAY JUN 1 1 1973

Versus

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT
OF INSTITUTIONS

On Writ of Certiorari, or Review, to the
Court of Appeal, First Circuit
Parish of East Baton Rouge, Louisiana.

DIXON, Justice

Jerry Lee Nedd brings this action for damages for injuries suffered at the hands of a fellow inmate in the Louisiana State Penitentiary.

There was judgment rejecting plaintiff's demand in the trial court, which was affirmed by the Court of Appeal. 255 So. 2d 492.

Nedd's claim for damages is based on the failure of the State to keep him separated from McKinley Peterson, the man who injured him. In 1958, Nedd was injured in Angola in an attack by another inmate. While he was lying in his bed Nedd was struck in the head with a piece of pipe. Nedd did not see his assailant. However, McKinley Peterson pleaded guilty to the aggravated battery and received a sentence of five years.

Barham & Tate, J.J., dissent and assign written reasons.
Culotta, J. concurs

Nedd and Peterson were in and out of jail and prison from 1958 until Nedd returned to Angola in 1967. Nedd contends that he was afraid that McKinley Peterson, resentful for having received an additional five years as a result of the 1958 battery, would do additional harm to him if the opportunity arose. Nedd testified that he learned Peterson's location upon arriving at Angola in February, 1967, and requested, before the classification board, that he be sent to a different camp.

The classification board did not have before it a record of the 1958 incident. The evidence is conflicting concerning what Nedd told the classification board. Nedd contends that he informed the board of his fear of Peterson. His testimony is not supported by other witnesses.

Nevertheless, Nedd was not assigned to the same area where Peterson was located.

Subsequently, in November of 1967, Nedd was transferred to the same camp where Peterson happened to be located. Nedd contends that upon learning of his impending transfer, he attempted to talk with Major Bryan, chief of security. But Nedd himself admitted that he did not explain to Major Bryan the reason for his fear, and was told that he must go where he was sent.

The only witnesses called by the plaintiff were Major Bryan on cross-examination and Nedd himself. Nedd testified that there had been no communication between

him and Peterson between 1958 and January 27, 1968, the day of the altercation with Peterson. The only reason he expressed for fearing Peterson was the natural (in Nedd's opinion) resentment Peterson would feel for having received a five year sentence for his attack upon Nedd nine years earlier.

The only basis for Nedd's claim against the State is its failure to separate him from Peterson. If we assume that the State, through its officials at the Louisiana State Penitentiary, should have known everything Nedd knew (Nedd's fear and the reason for his fear) we cannot hold that the State would have been under an obligation to separate Nedd from Peterson.

The evidence in this record does not establish a reasonable basis for placing prison officials on notice that Nedd was in danger from Peterson. The record before us establishes that fights occurred at the penitentiary on a daily basis; knifings, cuttings and stabbings on a weekly basis; that frequently, some men who have fought, cut and stabbed each other later live harmoniously in the prison population. Major Bryan testified that if he had known what Nedd said he told the classification board, he would not necessarily have separated Nedd and Peterson.

In addition, the record before us is wholly insufficient to establish Nedd's contention that he was attacked without provocation by Peterson, motivated by

revenge for the five year sentence after the 1958 attack.

Nedd was an habitual offender. Almost all of the testimony he gave was contradicted. Other evidence in the record, just as believable as Nedd's testimony, indicates that the altercation was not an unprovoked attack by Peterson. Other evidence also indicates that Nedd and Peterson had been together frequently during the years that intervened between the first attack and the last. For several months they were in the Orleans Parish prison. There is evidence that they played cards together in the parish prison and in the penitentiary. There is evidence that Nedd stabbed Peterson in the shoulder just a few weeks before the altercation of January 27, 1968, and had argued with him for more than thirty minutes on the day of the fight.

Nedd claimed that he was attacked without cause by Peterson, who was wielding a cane knife. Nedd claims that he lost some fingers in an effort to defend himself with a bed board. Peterson and another convict witness testified that Nedd started the fight, cutting Peterson in the hand without provocation. Four convicts were involved in the altercation. All four were cut.

It is not possible to tell where the truth lies from this record.

The Court of Appeal was correct in its conclusion that plaintiff failed to establish that the State had abrogated the standard of care incumbent upon it for

the protection of prisoners in its custody.

For these reasons, the judgment of the Court of Appeal is affirmed at plaintiff's cost.

SUPREME COURT OF LOUISIANA

JERRY LEE NEDD

versus NO. 52,073

STATE OF LOUISIANA THROUGH
DEPARTMENT OF INSTITUTIONS

On Writ of Certiorari, or Review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

* * *

Dissenting Opinion

BARHAM and TATE, Justices.

We respectfully dissent.

Essentially, we feel that the record indicates that the state knew, or should have known, of the great danger of harm to which the plaintiff Nedd was exposed by being placed in unguarded proximity to the vengeful Peterson, his assailant. Peterson had earlier been sentenced to an additional five years in the penitentiary for an earlier physical attack upon Nedd.

Aside from Nedd's repeated attempts to secure separation from Peterson, the danger to Nedd was, or should have been, obvious. The state should not be able to exculpate itself from liability to inmates upon a claim of ignorance of facts of which it should be aware. (No more, for instance, than should a railroad be able to exculpate itself from liability

for the negligence of its engineer upon his proving he did not know he was exceeding the speed limit in a municipality, or upon the railroad company's claim that it did not know that its engineer did not know the speed limit in the municipality.)

The concept of negligence envisions a departure by one from a uniform standard of behavior which is owed under the particular circumstances to the person who is harmed as a result of the risk caused by the departure from that standard. That standard is an attempt to set as a matter of law an objective rather than a subjective guide, and should apply generally to all. However, we recognize that that standard in a particular case must always be set after a consideration of the risk involved, the apparentness of the risk to the one who creates it, the relationship of the actor and the one harmed, and the particular or peculiar facts and circumstances of the situation giving rise to the risk. Grand Trunk Ry. v. Ives, 144 U.S. 408, 12 S.Ct. 679, 36 L.Ed. 485 (1891); Green, the Negligence Issue, 37 Yale L. J. 1029. The law has created an abstract, ideal reasonable man, and requires all to act as prudently and carefully as would this mythical person under the same or similar circumstances to that class of people of which the injured person is a member. Prosser, Torts, §32, p. 151 (4th Ed. 1971); James, the Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1. Just as the standard of conduct may be lowered as in the case of an emergency, that standard may be raised because the activity engaged in creates a peculiar relationship or requires special knowledge or skill. See James, supra, at pp. 12-17.

A resolution of whether the law will declare one's actions negligent requires first a determination of the duty of care, if any, which was owed to the one who was exposed to the risk which caused the harm. Salmond, Torts § 80 (Hueston, 14th Ed. 1965); James, General Principles of the Law of Torts, p. 151 (2nd Ed. 1964); Lawson, The Duty of Care in Negligence: A Comparative Study, 22 Tul. L. Rev. 111. Here in particular, we must decide the duty of care, if any, owed by the defendant and its employees to guard against the particular risk of harm to which this plaintiff was subjected. Those who have custody and control over the decisional processes and the freedom of movement of people in an institution, such as the penal institution operated by the defendant, are responsible for their own affirmative acts or omissions which directly result in injury through breach of duty. They may also be responsible for their affirmative acts or omissions to act which allow others in their custody to act negligently or intentionally to cause harm, if the negligent or intentional act of the others occurs because of a breach of duty to the injured party arising out of the relative positions of the custodian and those in custody.

While forseeability is a factor for consideration in determining the scope of the duty of care so as to ascertain whether the defendant's servants have in fact been negligent, other factors must also be considered, for " ' the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances' ". James, General Principles of the Law of Torts, p. 173 (2nd Ed. 1964).

In a penitentiary environment an inmate is severely limited in his means of self-protection and self-control, while the chance of his encountering violence and intentional assaults and batteries is multiplied by the very conditions under which he must live. When a number of persons, many of whom are known to be predisposed to violence, are forced to live together in confined quarters under unnatural conditions, it is not unusual for an explosive situation to develop. The plaintiff-prisoner, one of a special class of persons, and the defendant-authority here have a particular and peculiar relationship not existing between persons in an ordinary community, and therefore whether the scope of duty owed encompassed the risk of the intentional harm here encountered must be determined in the light of this peculiar relationship and these special circumstances.

While imprisonment of one convicted of crime may deprive him of certain constitutional rights as well as other rights and privileges accorded the non-criminal, only those rights necessary for carrying out the public policy of the state as set out in the statutes governing imprisonment of criminals may be curtailed or denied the prisoner. All other rights not expressly or impliedly taken away by statute as a part of the criminal sanction and the correctional process are retained by the prisoner. Freedom of movement, freedom of choice, and the facility for self-protection are essentially denied or at least curtailed under the statutory authority for carrying out the correctional process in Louisiana. Therefore those who have custody over prisoners are under a duty to exercise reasonable care in controlling the conduct of the prisoners to prevent them from intentionally harming one another. The custodians must exercise this care in light of the knowledge of the propensity of those whom they control for inflicting intentional personal injury upon others, and knowledge of the

probabilities that because of special circumstances the custodians may be required to protect certain prisoners from intentional wrongs. This does not mean the penitentiary authorities are held accountable for any and all injuries inflicted by one inmate on another. Their accountability is determined by the facts that are within their knowledge or should have been within their knowledge. See 2 Restatement of Torts 2d § 320 (1965).

These general principles of law should be applied to the facts of this case. In this particular case the authorities admittedly knew many of the facts which would have caused a reasonable, prudent man acting in this particular relationship to know of the likelihood of the particular risk which might occur. Other facts should have been known. Of first importance is the fact that Nedd and Peterson had had the previous serious encounter. Major Bryan, chief of security, who was on the classification board, admitted that he probably had independent recollection of this prior encounter. The seriousness of that earlier encounter and injury nullifies any argument that the incident was too remote to be of importance, especially when Nedd, in the early days of his present imprisonment, expressed his fears to the board of classification which included Major Bryan. Although the board was told of the prior encounter and the possibility of a dangerous situation between Nedd and Peterson, no notation appears in the record of either inmate of this serious condition. Moreover, the record keeper testified that Peterson's unprovoked attack upon Nedd in 1958 which almost killed him should have been noted in the records of the classification office. However, the only mention of that affair is a postcard dated 8/11/58, the date of the first incident, from Charity Hospital to the superintendent of Angola saying that Nedd was dangerously ill and that visitors were to be limited. If a proper report

of this incident had been in Nedd's file, it would have been included in the admission summary prepared for the classification board when Nedd was returned to Angola in 1967. This would have constituted actual notice to the board of the potential danger in quartering Nedd with Peterson during any time between his entrance and his discharge from the prison. Nevertheless the board and the particular members sitting had actual notice because Nedd reported his fears to them, and they reacted by giving him special quarters when he was classified.

The prison authorities made no investigation at any time into the prior encounter. As the Court of Appeal stated, Major Bryan thought Nedd's first request for not being assigned to Hickory II was merely an attempt "to be assigned to a minimum security camp and [he] did not believe that Nedd was truly concerned about his safety or that the matter required any further investigation". Apparently because many inmates' complaints are without merit and deviously made, prison personnel tend to discount or even disregard valid complaints such as those made by Nedd.

Also to be considered is the conversation between Nedd and Major Bryan just before his assignment to Camp A where the amputation of the fingers occurred. Although the conversation was brief, Major Bryan, with the knowledge previously obtained at the session of the board of classification, should have been on notice to investigate. Major Bryan testified that he did not remember the request from Nedd just before his transfer in 1968 to Camp A where Peterson was then quartered. Nedd testified that he told Major Bryan that he couldn't go over to Camp A because Peterson was over there, and that Major Bryan had responded: "You go where you are sent, not where you want." This appears to be a final unappealable determination by the highest authority, the officer in charge

of security. Nedd testified to two other requests for removal from Camp A, one to the doctor when he visited the penitentiary hospital facility and another when he was brought before the disciplinary board. There is nothing in the prison records to support Nedd's testimony, but this is to be expected since the prison records are sparse and especially since the more serious occurrence of 1958 and Nedd's reference to it before the classification board do not appear in the records.

The prison authorities would be charged with constructive notice of the probability of the particular risk to Nedd under the facts and circumstances of this case. However, the prison authorities actually knew of the grave risk that intentional harm would be inflicted by Peterson on Nedd if they were confined together. However, as previously stated, forseeability is not the lone criterion for judging the scope of the duty owed to protect from a risk. Even if it were the only test to be applied to the case at hand, the record supports the conclusion that the risk was forseeable.

The risk encountered by Nedd, that is, the intentional battery where his fingers were severed or injured when Peterson used the cane knife in an attack upon him, is one encompassed within the scope of the duty the prison authorities owed to the inmate Nedd. The prison authorities breached this duty by failing to quarter these inmates separately, by failing to keep proper records, and by failing to investigate. Therefore, the defendant's servants having breached the duty of reasonable, prudent men under the circumstances and facts peculiar to the relationship between the parties, the defendant must respond in damages, for this is negligence.

The Court of Appeal found that "Nedd remained in his dangerous circumstances as much because of his own silence and inaction as because

of any alleged failure on the part of the prison personnel". On this finding that court charged him with contributory negligence barring recovery. We do not so conclude under our consideration of the law and the record before us.

It is not probable under the record that any affirmative action by Nedd, through letters or other notice, would have changed the attitude of the prison authorities so that his circumstances would have been changed. As the majority votes, the prison authorities were not seriously concerned with the dangerous circumstances confronting Nedd. The very nature of the operation of the prison requires that any decision regarding placements of prisoners must rest with the prison authorities. With as much actual notice as they had of the circumstances which should have resulted in separation of these two inmates, further notice more probably than not would have availed Nedd little. The defendant cannot shift the responsibility it has for physical placement of the inmate Nedd simply because he finally desisted from complaining of a matter of which they had actual notice. As previously noted, the final authority, the Chief of Security had told Nedd he would go where he was told to go and not where he wanted to go. Persistance did not and would not have availed any change for Nedd. The plea of contributory negligence is without merit.

Within the limited facilities available, the penitentiary administration may have done its best; but this best was not enough to afford adequate custodial safety as demanded by the standards of a civilized society. The state's failure to appropriate adequate monies for the state's institutions to perform their custodial function should not, in this last part

of the Twentieth Century, immunize the state from liability to an inmate who is injured through the state's lack of reasonable care in furnishing reasonable safeguards for his physical security while he is in the state's custody and unable to fend for himself.

We therefore respectfully dissent.

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In the Supreme Court of the United States

JERRY LEE NEDD

v.

STATE OF LOUISIANA THROUGH
DEPARTMENT OF INSTITUTIONS

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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STATE OF LOUISIANA THROUGH
DEPARTMENT OF INSTITUTIONS

OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

May it Please the Court:

At the outset, defendant-respondent takes issue with the very jurisdictional assertions of plaintiff. Title 28, Section 1257 of the United States Code establishes the basis for jurisdiction for appeals or writs of certiorari from the decisions of state courts. Subparagraph 2 of Section 1257 provides that an appeal might be granted if the validity of a state statute had been drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of its validity. At no time or through no pleading was *any* statute of the State of Louisiana even set forth, much less drawn in question. Similarly, subsection 3 of Section 1257 contemplates application for writ of certiorari would be

granted if likewise a state statute had been drawn in question as being repugnant to the constitution, treaties and laws of the United States or where any right, privilege or immunity is *specially set up* or claimed. At no point in the proceedings were any such questions raised. From the initial petition filed in the District Court for the State of Louisiana in January of 1969 up through the petition for rehearing to the Louisiana Supreme Court filed in June of 1973, the case was merely one of simple negligence founded on ordinary hornbook standards. Every bit of evidence adduced by the plaintiff at the trial and every argument made in brief thereafter related to plaintiff's efforts to establish the state's violation of its duty toward this plaintiff. Quite the contrary from the situations contemplated by Title 28, Section 1257, plaintiff at all times accepted the state negligence standard as set forth in the then leading case on inmate injury of *St. Julian v. State*, 98 So. 2d 284 (1st Cir. 1957). The entire thrust of the plaintiff's legal attack on review throughout the state system has merely been on the manner in which he believed he had met the tests. At no time was the state standard challenged. Plaintiff merely asked both the intermediate Court of Appeal and the Louisiana Supreme Court to reach a different conclusion on the same set of facts found by the trial court, asking in effect that the reviewing court hold that reasonable men could *not* disagree on the conclusion which should be reached. That conclusion obviously, from the plaintiff's standpoint, should have been that the state breached its duty of reasonable care to the plaintiff.

There is *nothing* in the record of this case through either petitions, briefs or oral arguments that suggest a deficiency in the standard itself as applied by the state. The validity of the state's jurisprudential rule was never called into question, merely the contention that plaintiff had satisfied the requirements for recovery. Thus it is clear the tests of Title 28, §1257 have not been met and the application should be denied.

The only other ground on which this court should entertain the application for certiorari herein is under its Rule 19 which reads in part:

> ". . . The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "a. Where a state court has decided a *federal question of substance* not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Emphasis added)

Defendant-respondent submits that there is utterly no "federal question" of substance or otherwise presented by the decision of the lower court. Since the plaintiff at no time alleged any deprivation of constitutional rights, defendant never responded thereto nor had occasion to discuss the range of constitutional rights reserved for inmates. The dissenting opinion in the lower court made some mention of the fact that inmates do retain certain civil rights. Again, in plaintiff's application for certiorari to this court, he dis-

cusses the fact that he retains certain minimal civil rights.

Respondent has utterly no quarrel with this and would emphatically state that plaintiff retains certainly his basic constitutional freedoms, particularly to be free from cruel and unusual punishment and to be afforded due process before the rendition of punishment. Whether the petitioner endured cruel punishment by living in fear addresses itself to the merits of this case, although respondent suggests that there was no evidence in the record to that effect. Rather the contrary; that after finding himself in proximity to the assailant, petitioner made absolutely no expression of concern for his own safety. But the merits aside for purposes of this matter of granting or not granting certiorari, respondent submits that the issue before this court is whether the *decision* of the Supreme Court of Louisiana deprives this plaintiff of constitutional rights. In other words, does the affirmance of the dismissal of his case of negligence constitute cruel and unusual punishment or deny him due process or some other constitutional guarantee.

In order for this Honorable Court to grant the request for certiorari, respondent submits that it will have to attribute probable constitutional inadequacies to the opinion inasmuch as the decisions of every court which have heard this case have turned merely on the factual determination that the prison administration did *not* have sufficient reason to anticipate the injury which was inflicted. A review by this Honorable Court would require a determination that each decision below

was so blatantly erroneous as to constitute a denial of due process. Such a step is hardly indicated. Respondent will concede that it was unable to find where this court has ruled on a similar factual case on the merits, so whether the lower courts have "decided it in a way probably not in accord with applicable decisions of this court" is rather speculative. True, plaintiff has cited several decisions of lower federal courts favorable to the plaintiff under circumstances similar to the instant case. Such decisions are totally irrelevant and unpersuasive on the immediate question of whether this Honorable Court should review the decisions below. The cases cited by the plaintiff address themselves to the merits and if this case were coming to the Supreme Court of the United States through the federal system after relief had been denied in the lower federal courts, perhaps there would be a need for review by the Supreme Court to settle any conflict among the circuits, to reverse a lower decision in conflict with a direct Supreme Court decision, or to reverse a decision of state law in conflict with state law. (Rule 19b.) Clearly none of those elements are present in the instant case and the criteria for accepting a case for review from the highest court of a state should and must be quite distinct from those applied in determining whether cases arising in the federal system should be reviewed. That is the reason Congress adopted Title 28, Section 1257.

The issue at this time is not whether *Roberts v. Williams*, 302 F. Supp. 972, *Brenneman v. Madigan*,

343 F. Supp. 128, *Penn v. Oliver*, 351 F. Supp. 1292, or *McLaughlin v. Roystel*, 346 F. Supp. 297, should be decided differently. The issue is not really even whether *Jerry Lee Nedd v. State of Louisiana* should have been decided different by the Supreme Court of Louisiana on the merits. The issue is whether the validity of a state statute has been sustained against an attack of being repugnant to the constitutional laws of the United States or whether any title, right, privilege or immunity is claimed by the plaintiff under the constitutional, and the lower state courts have rejected such claim. If such were *not* the disposition by the lower courts on the basis that no such constitutional right was asserted nor was the validity of a state statute questioned, then it should be clear that the application for certiorari should be denied. When no such ground has been presented to or considered by the courts of the state the federal Supreme Court has no jurisdiction. *Michigan Central Railroad Company v. Michigan Railroad Company*, 60 U. S. 378, 19 How. 378, 15 L. Ed. 689. See also *Green v. Frarier*, 40 Sup. Ct. 499, 253 U. S. 233, 64 L. Ed. 878. *Miller v. Cornwall Railroad Company*, 18 Sup. Ct. 34, 168 U. S. 131, 42 L. Ed. 409; and the earlier Louisiana case of *Adams v. Preston*, 63 U. S. 473, 22 How. 473, 16 L. Ed. 273. It is essential that there be explicit and timely insistence in the state court that a state statute, as applied, is repugnant to federal constitutional treaties or laws, and it does not suffice for the applicants to phrase their constitutional claim as attacks on the constitutionality of the results obtained below. See *Raley v.*

State of Ohio, 79 Sup. Ct. 1257, 360 U. S. 423, 3 L. Ed. 2d 1344.

While respondent strongly feels that the federal District Court decisions cited by plaintiff in his application, and just recited above, have marginal utility in a consideration of the question at hand, it is significant to note only one has permitted recovery on the basis of the defendant's denial of the plaintiff's right to be free from cruel and unusual punishment stemming from a single isolated incident of injury. (*Roberts v. Williams*, supra).

The other cases establish and adhere to the usual test that the conduct complained of should shock the conscience or be intolerable to fundamental fairness. Giving a totally incapable inmate a loaded shotgun without any instruction on its use and placing him in immediate proximity to other inmates certainly would fall into that category, and the court so held. The two cases most nearly identical on the facts to the case at issue both denied recovery. In *Penn v. Oliver*, supra, the court reasoned there must be a showing either of a pattern of indisputed and unchecked violence or, on a different level, of an egregious failure to provide security to a particular inmate before a deprivation of constitutional right is stated. An isolated act by a prison official that allows an attack to occur and which involves *simple negligence* only, does not constitute a constitutional deprivation. (*Penn v. Oliver*, supra). In *McLaughlin v. Roystel*, supra, the court likewise denied recovery to an inmate who claimed to be in

constant fear of attack from other inmates. The court indicated that such is always a danger as long as every inmate is not confined behind bars at all hours and so long as reasonable precautions are taken there should be no recovery.

It is submitted that a determination of whether the precautions were reasonable is one of degree on which reasonable men might disagree. Consequently, and in the face of a unanimous rejection of the claims of the plaintiff in the courts below it is submitted that no substantial federal question is presented to this court warranting the exercise of its reviewing authority, especially in the face of similar decisions within the federal system.

In addition to the above and foregoing objections to the application for certiorari, respondent further objects to certain provisions of the statement of the case as contained in plaintiff's application, and under the authority of Rule 40(3) does make the following observations. On Page 7 of the application, plaintiff indicates that Nedd and Peterson did not have contact with each other while out of Angola. The evidence is conflicting on this subject and the opinion of the Supreme Court below, Page 4 of the Appendix to Applicant's Brief, indicates that they felt the parties had had contact together before their return to the prison. Additionally, on Pages 8 and 9 of the application, the impression is left that Nedd mentioned his assailant Peterson by name at each occasion of his confrontation with Major Bryan. Such is not borne out by the evidence.

For the above and foregoing reasons respondent urges that the application for certiorari be rejected.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing brief in opposition to application for writ of certiorari upon Steven R. Plotkin, attorney for plaintiff, by depositing said copy in the United States mail addressed to him at 305 Baronne Street, 9th Floor, New Orleans, Louisiana, postage prepaid.

Baton Rouge, Louisiana, this _____ day of February, 1974.

STANFORD O. BARDWELL, JR.

B-4517, 2-74